Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

SHELDON P. KOTTLE, M.D.,

Petitioner,

v.

NORTHWEST KIDNEY CENTERS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the "sham exception" to the Noerr-Pennington doctrine, has plaintiff sufficiently stated a cause of action where he has alleged that defendant, a monopolist in the provision of kidney dialysis services in the relevant geographical market, made intentional misrepresentations and false statements in an adjudicatory proceeding before a state administrative body in a successful effort to exclude plaintiff from the market?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were:

Appellant (Petitioner herein): Sheldon P. Kottle, M.D.

Appellee (Respondent herein): Northwest Kidney Centers

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PETITION FOR WRIT OF CERTIORARI

Sheldon P. Kottle, M.D. ("Kottle") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 18, 1998, in order to clarify an important issue expressly left open in a prior opinion of the Supreme Court and to resolve the conflict between the Ninth and the Fourth, Eleventh and District of Columbia Circuit Courts of Appeals on the important issue presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit that gives rise to this petition was filed June 18, 1998 and is published at 146 F.3d 1056 (9th Cir. 1998). It is reprinted in Appendix A hereto ("App. A") at page A-1. By order filed August 19, 1998, the Ninth Circuit denied Kottle's timely petition for rehearing. App. D-1.

JURISDICTION

On October 4, 1996, the United States District Court for the Western District of Washington issued a judgment and order granting Northwest Kidney Centers' ("NWK") motion to dismiss Kottle's antitrust complaint pursuant to Fed. R. Civ. P. 12(b)(6). Kottle's timely-filed motion for reconsideration was denied by the district court on October 30, 1996.

Kottle appealed to the Ninth Circuit, which affirmed in a published opinion filed on June 18, 1998. On August 19, 1998 the Ninth Circuit denied Kottle's timely motion for rehearing. Pursuant to Supreme Court Rule 13.3, this petition has been filed within ninety (90) days of the denial of the rehearing. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Sherman Act §§ 1 and 2, 15 U.S.C. §§ 1, 2; Revised Code of Washington (RCW) 19.86.030 *et seq.*, and 70.38.115; Chapter 246-310 of the Washington Administrative Code (WAC) sections 190, 200(1), 210(1)(b) and (2), and 500(3) and (6). These statutes and regulations appear verbatim at Appendix E1-E5.

STATEMENT OF THE CASE

The fundamental issue in this case is whether intentional misrepresentations and false statements made to a state administrative body in an adjudicatory proceeding can constitute a "sham" sufficient to remove petitioning activity from the protection of the *Noerr-Pennington* doctrine. While the Court has discussed this issue in prior rulings, it has never resolved the question; meanwhile, those Circuit Courts of Appeals which have addressed the issue have resolved it in conflicting manner.

The essence of Kottle's claims against NWK for violations of federal and state antitrust law was stated by the Ninth Circuit in its published opinion:

> Plaintiff-appellant Sheldon P. Kottle is a physician specializing in nephrology and transplant medicine. Kottle is the sole officer and shareholder of King County Kidney Center ("KCKC"). In 1991, Kottle filed CON applications with the Department seeking approval to build two kidney dialysis centers under the name KCKC. At that time, defendant Northwest Kidney Centers ("NWK") was the only provider of kidney dialysis services in King County. Perceiving Kottle to be a threat to its monopoly, NWK began a hostile campaign to prevent Kottle from establishing KCKC within NWK's market. NWK undermined Kottle's business negotiations and aggressively opposed Kottle's CON applications using methods and means which were improper and unlawful. NWK made false statements of fact and misrepresentations about Kottle and KCKC and encouraged others to do so. NWK's false statements and misrepresentations included the need for kidney dialysis services in King County. Influenced by NWK's statements, the Department rejected Kottle's CON applications on March 30, 1992. At all times, NWK acted with the intent of eliminating competition and preserving its monopoly in the kidney dialysis market in King County. In 1995, NWK filed its own CON application for a similar dialysis facility at the same location. Contrary to its own statements opposing Kottle's CON application in 1992, the data presented by NWK in 1995 show that it knew of the need for

> kidney dialysis services in King County over the past 15 years.

App. A3-4.

The District Court, acting on NWK's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), dismissed Kottle's complaint stating that his allegations were insufficient to avoid the protection afforded petitioning activity under the Noerr-Pennington doctrine. Kottle filed his Notice of Appeal after the District Court denied his motion for reconsideration.

The Ninth Circuit affirmed, holding that Kottle's allegations of intentional misrepresentations and false statements did not meet the sham exception under *Noerr*. Finding that the CON determination by the State of Washington Department of Health reflected "a true adjudicatory proceeding", App. A14, the Ninth Circuit applied the sham *litigation* exception articulated by this Court in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993). Applying this standard, the Ninth Circuit determined that Kottle could avoid the Noerr-Pennington doctrine only if his allegations showed one of three things: (1) NWK's advocacy before the Department was objectively baseless and merely an attempt to stifle competition; (2) NWK engaged in a pattern of petitions before the Department without regard to the merit of the petitions; or (3) NWK's misrepresentation before the Department deprived the entire CON proceeding of its legitimacy. App. A14-15.

The Court summarily dismissed as inapplicable two of these three grounds for applying the sham litigation exception.

> We can easily dispense with the second of these grounds because Kottle's complaint alleges interference with only two CON applications . . . We can also dispense with the first of these grounds. NWK's advocacy before the Department was not objectively baseless because NWK prevailed. In the litigation context, the Supreme Court has reminded us that a winning lawsuit is, by definition, not objectively baseless. *Professional Real Estate*, 508 U.S. at 61 n.5. Because we view the CON hearing as analogous to litigation, we must conclude that a victory before the Department necessarily indicates that NWK's position was not objectively baseless. . . . This leaves Kottle with only the third of the sham exception possibilities. Notwithstanding Noerr-Pennington, Kottle can overcome a 12(b)(6) motion if his allegations demonstrate that NWK so misrepresented the truth to the Department that the entire CON proceeding was deprived of its legitimacy. Kottle's complaint, however, falls far short of adequately alleging this variant of the sham exception.

App. A14-16.

Kottle's petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's Opinion Squarely Presents To This Court The Unresolved Issue Of Whether Misrepresentations In The Administrative Adjudicatory Context Removes The Protections Afforded By The Noerr-Pennington Doctrine.

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), this Court articulated general principles of immunity that the federal antitrust laws did not apply to attempts by competitors to petition the government, even if the result of such petitioning were anti-competitive. *Noerr* held that the Sherman Act did not apply to a successful campaign by railroad executives to create public distrust of the freight trucking industry, a campaign that led to numerous state laws regulating freight trucking, since the application of the antitrust laws to "political activity" would frustrate the workings of a democratic government and likely would raise significant First Amendment concerns. 365 U.S. at 129-32, 137-38. In *United Mine Workers v. Pennington*, this Court extended *Noerr* to "concerted effort[s] to influence public officials." 381 U.S. 657, 670 (1965). However, the immunity provided by what subsequently became known as the *Noerr-Pennington* doctrine was not absolute and an antitrust plaintiff could still proceed if it could be shown that the petitioning activity at issue was a mere "sham".

In *Professional Real Estate Investors Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), the Court outlined a two-part definition of sham litigation. First, the

Court stated, "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits . . . Only if the challenged litigation is objectively meritless may a Court examine the litigant's subjective motivation." *Id.*, at 60. Furthermore, the Court stated that "a winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham." *Id.* at 61 n.5.

In articulating this two-part definition of sham litigation, the Court expressly left open the issue first raised in *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 512-513 (1972) and presented in this case: namely, whether *Noerr* permits imposition of antitrust liability for a competitors' false statements or other misrepresentations in an administrative adjudicatory proceeding.

> In surveying the "forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations," we have noted that "unethical conduct in the setting of the adjudicatory process often results in sanctions" and that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *California Motor Transport*, 404 U.S. at 512-513, 30 L. Ed. 2d at 642, 92 S.Ct. 609. ***We need not decide here whether and, if so, to what extent Noerr permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations.***

Id. at 61 n.6 (emphasis added).

The need to distinguish "misrepresentations . . . used in the *adjudicatory* process" from sham *litigation* for purposes of applying *Noerr* protection becomes clear when

one considers how ill-suited the two-part sham *litigation* standard is for the *adjudicatory* setting before an administrative body. This Court appears to have anticipated such a distinction in its footnote 6 in *Professional Real Estate Investors*. There would be no other purpose served by the footnote if the Court had actually intended the two-part definition of "sham" litigation to be applied in exactly the same manner as "shams" involving misrepresentations in the adjudicatory process.

By its own language, the two-part test for sham in *Professional Real Estate Investors* reflects that the type of "sham exception" the Court was discussing was directed only toward sham litigation. Articulating the first part of its test, the Court stated that the suit must be "objectively baseless in the sense that no reasonable *litigant* could realistically expect success on the merits"; second, "the baseless lawsuit" must conceal an attempt to interfere directly with the business relationships of the competitor. Furthermore, only if the "suit" is found to be objectively baseless does the Court proceed to examine the "*litigants'* " subjective intent. *Id.* at 624. These standards are unique to the litigation context and do not readily apply to the adjudicatory process before a state administrative body.

The scope of the sham exception and the standards by which it is to be applied must take into account the different branches of government and the different level of immunity appropriate to each. As the Ninth Circuit itself recognized in a previous published opinion, administrative agencies are significantly more vulnerable to intentional misrepresentations by a party's competitors in adjudicatory proceedings. *See Clipper Exxpress v. Rocky*

Mountain Motor Tariff Bureau, Inc., et al., 690 F.2d 1240 (9th Cir. 1980), *cert. denied* 459 U.S. 1227 (1983).

> [T]he [administrative] adjudicatory sphere is much different from the political sphere. There is an emphasis on debate in the political sphere, which could accommodate false statements and reveal their falsity. In the adjudicatory sphere, however, information supplied by the parties is relied on as accurate for decision making and dispute resolving. The supplying of fraudulent information thus threatens the fair and impartial functioning of these agencies and does not deserve immunity from the antitrust laws.

Id., at 1261.

The first part of the two-part sham *litigation* exception requires that an antitrust plaintiff show that the petitioning activity was "objectively baseless"; the Court went on to state that this threshold would be impossible to meet where the petitioning activity is successful. While such a standard has merit in the context of litigation where rules of evidence, broad discovery and the right of cross examination allow for a fair and impartial hearing, it does not readily apply in the administrative adjudicatory context.

While the mere fact of successful litigation often precludes a finding of sham litigation, misrepresentations and false statements to administrative bodies should not be immunized simply as a result of their success. *See California Motor Transport*, 404 U.S. at 513. If mere success immunizes a defendant's conduct, there would simply be no claim. By *winning* in an administrative adjudicatory proceeding, a victorious plaintiff would have no incentive

to apply for relief under the antitrust laws; by *losing* before such a body, plaintiffs would have no cause of action under the "objectively baseless" standard – never mind the unfair tactics used or the false and deceptive data presented. The result is wholly illogical and contrary to sound public policy. By definition, false statements and misrepresentations *are* "objectively baseless", irrespective of their successful effect on administrative agencies.

Applying an "intentional misrepresentation" standard rather than a "baseless litigation" standard in the kind of administrative adjudicatory context involved in this case is not only consistent with this Court's prior ruling in *California Motor Transport,* but it would also be consistent with other Circuit Courts of Appeals which have examined the scope of the sham exception in this context. *See St. Joseph's Hosp. v. Hospital Corp. of America,* 795 F.2d 948, 955 (11th Cir. 1986) ("The plaintiff here has alleged misrepresentations before a governmental agency . . . misrepresentation under these circumstances do not enjoy *Noerr* immunity."); *Hospital Building Company v. Rex Hospital,* 691 F.2d 678 (4th Cir. 1982), *cert. denied,* 464 U.S. 890 (1983) ("[M]isrepresentations, to fall within the sham exception to *Noerr-Pennington* immunity, must be made with the requisite intent. In these circumstances . . . misrepresentations made with intent to abuse the administrative processes . . . fall within the sham exception."); *Israel v. Baxter Laboratories, Inc.,* 466 F.2d 272, 275-80 (D.C. Cir. 1972) ("No actions which impair the fair and impartial functioning of an administrative agency should be allowed to hide behind the cloak of an antitrust exemption."); and *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., et al.,* 690 F.2d 1240, 1261 (9th Cir.

1980), *cert. denied*, 459 U.S. 1227 (1983) ("We hold that the fraudulent furnishing of false information to an agency in connection with an adjudicatory proceeding can be the basis for imposition of antitrust liability, if the requisite intent is present and the other elements of an antitrust claim are proven. . . . There is no first amendment protection for furnishing with predatory intent false information to an administrative or adjudicatory body.").

II.

The Ninth Circuit's Opinion Directly Conflicts With The Eleventh Circuit's Opinion in *St. Joseph's Hospital.*

The decision below is in direct conflict with the Eleventh Circuit's in *St. Joseph's Hosp. v. Hospital Corp. of America*, 795 F.2d 948 (11th Cir. 1986) on similar facts. In that case, St. Joseph's Hospital filed an application with the state of Georgia for a Certificate of Need (CON) to enable it to expand its cardiac care services to include cardiac surgical services. Memorial Medical Center (MMC), a competing general acute care hospital in Savannah, Georgia, opposed St. Joseph's application contending that it (MMC) had the current capacity to perform the type of open heart procedures to be offered by St. Joseph's and that its current capacity exceeded the requirements for the region, thereby making St. Joseph's entering into the market "unnecessary." St. Joseph's request for a CON was denied based upon the state of Georgia's determination that the services offered by CON would unnecessarily duplicate the services being provided by MMC.

Four months later, St. Joseph's filed a complaint, alleging that the defendant MMC had conspired to prevent St. Joseph's establishment of a cardiac surgery program in violation of the Sherman Act. *Id.* at 952-953. The central focus of St. Joseph's allegations, as stated in its Complaint, was that the defendant MMC had "submitted false information to the [state of Georgia] and the [state of Georgia] relied on that information in denying St. Joseph's application."

Like NWK, the defendant in *St. Joseph's* filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) relying upon Noerr-Pennington immunity. The District Court granted the motion and the Eleventh Circuit reversed. *Id.* at 957. The Eleventh Circuit determined that St. Joseph's allegation that MMC had made misrepresentations and false statements regarding its current capacity and ability to meet existing needs of the region were sufficient to preclude dismissal for failure to state a claim:

> The plaintiff here has alleged misrepresentations before a governmental agency. When a governmental agency . . . is passing on specific certificate applications it is acting judicially. Misrepresentations under these circumstances do not enjoy *Noerr* immunity.

St. Joseph's Hosp., 795 F.2d at 955.

NWK's illicit statements and conduct, as alleged herein, are indistinguishable from the conduct to which Eleventh Circuit applied the "sham exception" and reversed the District Court's granting of a motion to dismiss. Like the defendant in *St. Joseph's Hospital*, defendant NWK misrepresented the need for kidney dialysis

services in King County and its ability to meet the needs of King County residents with its then current capacity.

For the reasons stated in the preceding section, *St. Joseph's Hospital* presents the better reasoned approach to intentional misrepresentations and false statements before administrative adjudicatory agencies and is the approach being followed by other circuits. The conflict between the approach of the Eleventh Circuit and the Ninth Circuit should be resolved by this Court. *See Acosta v. Louisiana Dept. of Health and Human Res.*, 478 U.S. 251, 253 (1986) (Court granted petition for writ of certiorari to resolve conflicting interpretations of Fed. R. App. P. 4 and affirmed in *per curiam* opinion).

III.

The Ninth Circuit's Opinion Conflicts With This Court's Prior Rulings Regarding The Sufficiency Of Allegations In A Complaint To Withstand Motions To Dismiss Pursuant To Federal Rules Of Civil Procedure 12(b)(6).

This Court has stated that the liberal rules as to the sufficiency of a complaint make it a rare case in which a motion to dismiss should be granted pursuant to Fed. R. Civ. P. 12(b)(6). "[I]n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45 (1957). For purposes of a motion to dismiss, the complaint is to be construed in the light most favorable to

plaintiff and its allegations are to be taken as true. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). This liberal pleading standard is particularly important in antitrust litigation, as this Court stated in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962):

> Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.

Id. at 473. However, in its published opinion, the Ninth Circuit imposed a pleading standard that is nearly insurmountable in the absence of some formal discovery.

Kottle's complaint (CR 1)[1] specifically alleged that:

> 1. NWK organized a hostile campaign against Kottle which (a) prevented him from establishing a nephrology practice in the area and (b) hindered negotiations for lease of office and business space. (¶ 3.4)
>
> 2. NWK made false statements and intentional misrepresentations about Kottle and his proposed dialysis facilities and about (1) the objective need for kidney dialysis services in King County and (2) NWK's then existing capacity. (¶ 3.6)
>
> 3. NWK encouraged and coordinated the involvement of other business entities to oppose Kottle's CON application on false or misleading premises. (¶ 3.5)

---

[1] "CR" refers to the Court Record before the Ninth Circuit.

> 4. NWK's false statements and intentional misrepresentations were intended to and did influence the Department of Health to reject Kottle's CON applications. (¶3.6) and that
>
> 5. NWK acted with the sole intent of eliminating competition and preserving its monopoly in the provision of kidney dialysis services in King County. (¶ 3.4)

Although these are precisely the allegations which the Eleventh Circuit found sufficient to sustain a complaint for antitrust injury in *St. Joseph's Hospital*, Kottle did not simply rest upon these allegations; he supported them with substantial evidence from the same source of public records the Ninth Circuit deemed admissible in the context of an NWK affidavit submitted with its reply brief in the District Court. App. A17 n.7. As Kottle emphasized at oral argument in the court below, the record contains specific evidence showing that:

1. NWK purposely understated dialysis station need by 36%.

In 1992, when opposing Kottle's CON application, NWK stated " . . . through the year 1996, the number of stations [122] required in King County are already here . . . " CR 31 Exhibit 1, p. 19. However, in 1995 NWK stated that 20 additional stations had been built, 14 were pending and it was applying for 10 more. CR 38 Exhibit 1, p. 35.

2. NWK planned the identical center they opposed as "unnecessary".

The specification plans dated April 1994 contained in NWK's 1995 application to the State of Washington CON Board revealed that NWK was planning to construct a kidney dialysis facility of the identical name, size, and location as Kottle's – which they had presented false data showing it to be unnecessary. CR 38 Exhibit 1, pp. 7, 88; CR 31 Exhibit 1 pp. 17-20.

3. NWK reported false numbers from its records on home dialysis.

In 1992 NWK falsely reported that "the Northwest Kidney Center's historical database has shown actually that the home population has remained relatively stable over the last three years". However, in 1995 NWK presented contradictory data reflecting a clear decline in home dialysis treatments each year from 1989-1991. CR 31 Exhibit 1, p. 23; CR 38 Exhibit 1, p. 16.

4. NWK falsely reported that Kottle's center would increase health costs.

Although it had claimed otherwise at the time it was opposing Kottle's CON applications, in 1995 NWK admitted that reimbursements for kidney dialysis services were "not subject to, or affected by . . . expenditures by providers. Thus, the proposed expenditures will have no impact on charges for services." CR 38 Exhibit 1, p. 41.

5. NWK knew its opposition to Kottle's CON would result in a shortage of dialysis services.

In 1995 NWK admitted in its own application for the dialysis center it previously opposed that "In the absence of additional outpatient dialysis stations, NWK will no longer be able to meet the dialysis needs . . . in east King County", and "unless additional capacity is created there will be ***another*** shortage of dialysis stations . . . ". CR 38 Exhibit 1, p. 30, 35 (emphasis added).

Kottle also claimed that among NWK's "improper and/or unlawful methods of advocacy" were ***ex parte*** contacts with the Department of Health during the time it was actively opposing Kottle's CON application in a successful effort to change the methodology for calculating the need for dialysis facilities. CR 36 at ¶ 3.; CR 31 Exhibit 1, p. 18. These ***ex parte*** contacts occurred before and immediately after the public hearing on Kottle's applications, in violation of WAC 246-310-190. App. E4. NWK's ***ex parte*** intervention got the Department of Health to apply a different standard to determine kidney dialysis need than had been set forth in the regulations. While ***ex parte*** communications between a competitor and a governmental entity are insufficient to avoid Noerr-Pennington immunity in the *political* or *legislative* context, *see City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991), ***ex parte*** contacts are highly improper in the *adjudicatory setting* when a competitor's application is pending.

Kottle specifically alleged that NWK's false statements regarding the objective need for dialysis services and NWK's capacity to meet the projected need "were

intended to, and did, influence the Department of Health to reject Plaintiff's application" for certificates of need for the two dialysis facilities he proposed to build in King County. CR 1 at ¶ 3.6. NWK's false statements went to the core of the proceedings. As the statutes and regulations reflect, the touchstone of the certificate of need process is a determination of current and projected need for the services being proposed, and the ability of the existing facilities to meet those needs. RCW 70.38.115, App. E2, and WAC 246-310-200 and 210, App. E4-5. NWK admitted as much in its testimony opposing Kottle's CON. CR 31 Exhibit 1 at p. 17.

When false statements and intentional misrepresentations are made about these two "core" issues, it cannot help but infect the entire process – whatever the modest opportunity an applicant has to present contrary arguments. This is reflected in the Washington Department of Health regulations regarding CON proceedings. WAC 246-310-500(3)(a) and (6)(a) authorize the Department to suspend or revoke a CON for cause "which shall include, but not be limited to":

(i) Suspicion of fraud,

(ii) Misrepresentation,

(iii) False statements,

(iv) Misleading statements,

(v) Evasion or suppression of material facts in the application for a certificate of need or any of its supporting materials.

App. E6-7. CON applications granted even in part on the basis of false statements, misrepresentations or misleading statements are tainted and the process leading to the granting of such applications has been corrupted. When false statements and misrepresentations made by a successful ***applicant*** sufficiently corrupt the CON process as to warrant suspension of the CON, logic and common sense dictate that a similar corruption of the process occurs when such statements are made by a successful ***opponent*** of the CON.

Kottle has pled as specifically as can be expected that the core proceedings were corrupted. By ruling otherwise, the Ninth Circuit has placed an insurmountable burden upon plaintiff to ***prove*** somehow in the context of his complaint that the defendant's egregious conduct actually deprived the "core proceeding" of legitimacy. This simply cannot be done without some modicum of discovery. Rather, it should be sufficient at this stage of litigation for Kottle to specifically allege that defendant made materially false and deceptive statements to the Department of Health during the CON proceedings which influenced the Department of Health to deny plaintiff's CON application. Just as the perjury of a material witness corrupts a judicial proceeding and constitutes grounds for a new trial, false and deceptive statements made to an administrative body corrupts the decision-making process at that level – and all the more so when such statements are successful in persuading the administrative body to take the desired course of action.

There is nothing vague or ambiguous about the numbers contained in Kottle's pleadings supporting his antitrust claims against NWK, nor is there anything

vague about the impact NWK's intentional misrepresentations and false statements had on the CON proceeding before the Department of Health. The complaint and supporting pleadings include allegations of the specific activities not protected by *Noerr*. By insisting on a level of detail and specificity beyond that contained in Kottle's complaint and supporting materials, the Court essentially adopts a standard requiring "fact" pleading in such cases rather than the "notice" pleading provided in federal civil rules. Under the legal standards articulated by this Court in *Conley v. Gibson* and *Poller v. Columbia Broadcasting System*, the motion to dismiss for failure to state a claim should have been denied.

CONCLUSION

For the reasons set forth above, Dr. Kottle respectfully requests that the Court grant his petition for writ of certiorari.

Respectfully submitted,

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November 16, 1998.

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHELDON P. KOTTLE, *Plaintiff-Appellant,* v. NORTHWEST KIDNEY CENTERS, *Defendant-Appellee.*	No. 96-36258 D.C. No. CV 96-0472 CRD OPINION

Appeal from the United States District Court
for the Western District of Washington
Carolyn R. Dimmick, District Judge, Presiding

Argued and Submitted
May 6, 1998 – Seattle, Washington

Filed June 18, 1998

Before: David R. Thompson and A. Wallace Tashima, Circuit Judges, and Tom Stagg, District Judge.*

Opinion by Judge Tashima

COUNSEL

Mark G. Olson, Everett, Washington, for the plaintiff-appellant.

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* The Honorable Tom Stagg, Senior United States District Judge for the Western District of Louisiana, sitting by designation.

Douglas C. Ross, Davis Wright Tremaine, LLP, Seattle, Washington, for the defendant-appellee.

OPINION

TASHIMA, Circuit Judge:

In this case we apply the *Noerr-Pennington* doctrine in the context of an administrative proceeding. Specifically, we must determine whether the scope of the "sham" exception is different in an administrative proceeding than in litigation.

I. Background[1]

In 1979, the State of Washington enacted the Health Planning and Resource Development Act (the "Act"). RCW 70.38. The Act declares that it is the "public policy of this state" to engage in health planning and encourage both consumers and providers throughout the state to be involved so as to control "excessive increases in costs." RCW 70.38.015(1). The Act authorizes the Department of Health (the "Department") to administer a Certificate of Need ("CON") program to allocate health care resources. RCW 70.38.105(1). Under the CON program, the establishment of a new health care facility is subject to approval by the Department. RCW 70.38.105(4)(a). A kidney dialysis treatment center is such a health care facility subject to approval. WAC 246-310-010(18).

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[1] Because this is an appeal from a dismissal for failure to state a claim, we take Kottle's factual allegations as true. *Federation of African American Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir.1996).

After receiving a CON application, the Department may conduct a public hearing. RCW 70.38.115(9). At the hearing, any person may appear and be represented by counsel and may present oral and written argument and evidence. An "affected" person may also appear and "conduct reasonable questioning of persons who make relevant factual allegations." WAC 246-310-180(5). Any health care facility that provides services similar to those sought to be provided by the applicant is considered an "affected person." WAC 246-310-010(2)(b). Following the hearing, the Department must issue written findings. WAC 246-310-490(1). An applicant who has been denied a CON has the right to appeal the Department's decision to an adjudicative proceeding governed by the Washington Administrative Procedure Act ("APA"). RCW 70.38.115(10); WAC 246-310-610.

Plaintiff-appellant Sheldon P. Kottle is a physician specializing in nephrology and transplant medicine. Kottle is the sole officer and shareholder of King County Kidney Center ("KCKC"). In 1991, Kottle filed CON applications with the Department seeking approval to build two kidney dialysis centers under the name KCKC. At that time, defendant Northwest Kidney Centers ("NWK") was the only provider of kidney dialysis services in King County. Perceiving Kottle to be a threat to its monopoly, NWK began a hostile campaign to prevent Kottle from establishing KCKC within NWK's market. NWK undermined Kottle's business negotiations and aggressively opposed Kottle's CON applications using methods and means which were improper and unlawful. NWK made false statements of fact and misrepresentations about Kottle and KCKC and encouraged others to

do so. NWK's false statements and misrepresentations included the need for kidney dialysis services in King County. Influenced by NWK's statements, the Department rejected Kottle's CON applications on March 30, 1992.[2] At all times, NWK acted with the intent of eliminating competition and preserving its monopoly in the kidney dialysis market in King County. In 1995, NWK filed its own CON application for a similar dialysis facility at the same location. Contrary to its own statements opposing Kottle's CON application in 1992, the data presented by NWK in 1995 show that it knew of the need for kidney dialysis services in King County over the past 15 years.

In this action, Kottle alleged that NWK has unreasonably restrained trade and attempted to monopolize the market for kidney dialysis services in violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. The complaint also alleged supplemental state law claims for violation of Washington's antitrust law, RCW 19.86.030 *et seq.* The district court dismissed the action for failure to state a claim upon which relief can be granted. It held that NWK's activities were protected by the *Noerr-Pennington* doctrine. Kottle appeals, and we affirm.

II. The Noerr-Pennington Doctrine

The First Amendment to the United States Constitution guarantees the right "to petition the Government for

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[2] The record does not indicate whether Kottle exercised his right to appeal the Department's decision to an adjudicatory hearing.

a redress of grievances." U.S. Const. amend. I, cl. 6. The Supreme Court has long recognized that for the Petition Clause to be a meaningful protection of the democratic process, citizens must be immune from some forms of liability for their efforts to persuade government officials to adopt policy or perform their functions in a certain way. In *Eastern RR Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the Court rejected antitrust liability stemming from an aggressive lobbying campaign by railroads to persuade states to adopt legislation that would severely limit competition from truckers. The Court explained that "[i]n a representative democracy such as this . . . the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Id.* at 137. The Court then concluded that the Sherman Act did not apply to the railroads' advocacy of legislative action, notwithstanding their anticompetitive intent. *Id.* at 138.

The Court subsequently expanded the holding of *Noerr* to include activities aimed at the executive and judicial branches of government. *United Mine Workers v. Pennington*, 381 U.S. 657, 669-70 (1965) (executive); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (judicial). The Court explained that "the right to petition extends to all departments of the Government," and therefore, "[t]he same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government." *California Motor Transp.*, 404 U.S. at 612-13.

This circuit has clarified that the *Noerr-Pennington* doctrine is not merely a narrow interpretation of the

Sherman Act in order to avoid a statutory clash with First Amendment "values." Rather, the doctrine is a direct application of the Petition Clause, and we have used it to set aside antitrust actions premised on state law, as well as those based on federal law. *E.g., Amarel v. Connell,* 102 F.3d 1494, 1524 (9th Cir. 1996). Thus, the *Noerr-Pennington* doctrine sweeps broadly and is implicated by both state and federal antitrust claims that allege anticompetitive activity in the form of lobbying or advocacy before any branch of either federal or state government.[3]

Given the sweep of the *Noerr-Pennington* doctrine, we have no difficulty in joining our sister circuits to conclude that a lobbying effort designed to influence a state administrative agency's decision to issue a CON is within the ambit of the doctrine. *See Tarabishi v. McAlester Regional Hosp.*, 951 F.2d 1558, 1570 n.17 (10th Cir. 1991); *St. Joseph's Hosp. v. Hospital Corp. of America,* 795 F.2d 948, 955 (11th Cir. 1986). Indeed, in *Boulware v. State of Nev. Dep't of*

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[3] Of course, since the Petition Clause mentions only the right "to petition the *Government* for a redress of grievances," U.S. Const. amend. I, cl. 6 (emphasis added), the *Noerr-Pennington* doctrine does not protect lobbying efforts directed at private organizations. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-500 (1988). Kottle reads into *Allied Tube* a distinction between "political" and "economic" lobbying activity, from which he argues that the *Noerr-Pennington* doctrine does not apply in this case because NWK's activities were designed only to promote NWK's own economic gain. Such a distinction would render the doctrine a nullity since it is doubtful that an antitrust defendant exists that was not motivated by economic gain. We read *Allied Tube* more narrowly, as merely recognizing the public/private distinction recognized in the Petition Clause itself.

Human Resources, 960 F.2d 793 (9th Cir. 1992), we applied the *Noerr-Pennington* doctrine in the context of a state lawsuit that invoked a CON program in an attempt to quash competition. *See also Potters Med. Ctr. v. City Hosp. Ass'n*, 800 F.2d 568, 577-78 (6th Cir. 1986) (same). The only difference between *Boulware* and this case is that the advocacy here occurred before an administrative agency rather than a court. But since *Noerr-Pennington* protects advocacy before all branches of government, *California Motor Transp.*, 404 U.S. at 510, this is a distinction without a difference.[4] Accordingly, NWK's activities in this case implicate the *Noerr-Pennington* doctrine.

III. The Sham Exception

The more difficult question is whether NWK's activities fall within the "sham" exception to the *Noerr-Pennington* doctrine. In *Noerr*, the Court acknowledged that "[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere with the business relationships of a competitor, and the application of the Sherman Act would be justified." 365 U.S. at 144. In *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the Court explained:

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[4] The present case is also analogous to *Assigned Container Ship Claims, Inc. v. American President Lines, Ltd.*, 784 F.2d 1420 (9th Cir. 1986), in which we extended *Noerr-Pennington* immunity to petitions before the Federal Maritime Administration concerning the need for additional American flag ocean carrier service. *Id.* at 1422.

> The "sham" exception to *Noerr* encompasses situations in which persons use the governmental process – as opposed to the outcome of that process – as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. A "sham" situation involves a defendant whose activities are not genuinely aimed a procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result, but does so through improper means.

Id. at 380, 111 S.Ct. 1344 (citations and quotation marks omitted).

Although the *Noerr-Pennington* doctrine applies to activities directed at any branch of government, the scope of the sham exception depends on the type of governmental entity involved. *See California Motor Transp.*, 404 U.S. at 513 ("Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."); *Boone v. Redevelopment Agency*, 841 F.2d 886, 896 (9th Cir. 1988). When the branch of government involved is a court of law, this circuit recognizes three circumstances in which an antitrust defendant's activities might fall into the sham exception. First, if the alleged anticompetitive behavior consists of bringing a single sham lawsuit (or a small number of such suits), the antitrust plaintiff must demonstrate that the lawsuit was (1) objectively baseless, and (2) a concealed attempt to interfere with the plaintiff's business relationships. *Professional Real Estate Investors, Inc. v. Columbia Pictures*

Indus., Inc., 508 U.S. 49, 60-61 (1993); *Amarel*, 102 F.3d at 1518-19; *USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council*, 31 F.3d 800, 810-11 (9th Cir. 1994).

Second, if the alleged anticompetitive behavior is the filing of a series of lawsuits, "the question is not whether any one of them has merit – some may turn out to, just as a matter of chance – but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival." *Id.* at 811 (citing *California Motor Transp.*, 404 U.S. at 512); *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 534 (9th Cir. 1991).

Finally, in the context of a judicial proceeding, if the alleged anticompetitive behavior consists of making intentional misrepresentations to the court, litigation can be deemed a sham if "a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy." *Liberty Lake Inv., Inc. v. Magnuson*, 12 F.3d 155, 158 (9th Cir. 1993); *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1260 (9th Cir. 1980).

It is obvious that these three ways in which litigation might be a sham do not necessarily extend beyond the litigation context. For instance, if the alleged anticompetitive behavior consisted of lobbying a state legislature (as in *Noerr*), rather than filing a suit in state court, it would seem quite pointless to ask whether the lobbying effort was "objectively baseless." To decide objective baselessness, we would need objective standards, of which there are few, if any, in the political realm of legislation, against which to measure the defendant's conduct.

Similarly, the second and third variants of the litigation sham exception do not make sense in the legislative realm. Subjecting a defendant to antitrust liability because it pursued a pattern of baseless legal claims does not generate the same collateral consequences as subjecting the same defendant to antitrust liability because it engaged in numerous unsuccessful attempts to lobby a state legislature – the latter would eviscerate the Petition Clause. And the sham exception for intentional fraud on a court cannot lightly be taken to apply in a legislative context because, as the Supreme Court has observed, the political arena has a higher tolerance for outright lies than the judicial arena does. *California Motor Transp.*, 404 U.S. at 512-13.

Thus, the scope of the sham exception to the *Noerr-Pennington* doctrine depends on the branch of government involved. If it is the legislature, the sham exception is extraordinarily narrow. But if it is the judicial branch, this circuit recognizes three categories of anticompetitive behavior that can amount to a sham and, therefore, outside the protection of the *Noerr-Pennington* doctrine.

The present case, however, involves neither a court nor a legislature. Here we deal with asserted anticompetitive behavior directed at an administrative agency, and the question we must decide is what the scope of the sham exception is when the executive branch of the government is involved. Complicating our inquiry is the fact that the executive branch is radically diverse. At the federal level, it encompasses everything from formal hearings before independent administrative agencies, which are bound, both procedurally and substantively, by statutes and regulations, to the unapologetically political

decisions of trade negotiators and other Presidential advisers. At the state level, executive officials can likewise be elected or appointed, and they also have greatly varying levels of discretion and independence.

It seems clear that for some kinds of executive entities, the sham exception to the *Noerr-Pennington* doctrine should be the same as it is for judicial bodies,[5] but for others such a sham exception would be far too broad. In recognition of the vastly different types of executive entities that exist, this circuit has generally shaped the sham exception according to our estimation of whether the executive entity in question more resembled a judicial body, or more resembled a political entity. In *Amarel*, for example, we analyzed the putatively sham litigation under the "objectively baseless" inquiry established by *Professional Real Estate*. 102 F.3d at 1519-20. We then lumped the petitioning of State Department officials and Korean government officials alongside the lobbying efforts directed at members of Congress, and brusquely held these petitioning efforts shielded by *Noerr-Pennington*. *Id.* at 1520. Similarly, in *Boone*, we noted that the

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[5] The Supreme Court suggested as much in *California Motor Transp.* when it lumped together courts and certain administrative agencies, and referred to them collectively as "adjudicatory tribunals" for purposes of the sham exception. 404 U.S. at 512. As should be clear from our opinion, this circuit does not read *California Motor Transp.* to say that *all* administrative entities are equivalent to judicial ones for purposes of *Noerr-Pennington*. Rather, *California Motor Transp.* suggests that an administrative agency should be treated like a judicial one only if the former is, in fact, acting in an "adjudicatory" capacity.

administrative agency in question made decisions virtually unguided by enforceable standards and that these decisions could be appealed only to a legislative body. 841 F.2d at 896. We concluded that the agency was essentially a political body, and we refused to apply the broader sham exception that exists for judicial entities. *Id.* Our holding in *Boone* followed from a prior holding in *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976), that rejected the judicial sham exception for proceedings before the San Francisco Board of Permit Appeals, after concluding that the Board was essentially a political body. *Id.* at 1079.

By contrast, we have applied the judicial sham exception to proceedings before the Federal Maritime Administration, *Assigned Container*, 784 F.2d at 1423, and the Interstate Commerce Commission, *Clipper Exxpress*, 690 F.2d at 1262. We have suggested that the sham exception is narrower in communications with the police than it is in the legislative realm. *Forro Precision, Inc. v. IBM*, 673 F.2d 1045, 1060 (9th Cir. 1982). We have also discussed the sham exception as it applies to activities directed at a state attorney general, *Harman v. Valley Nat'l Bank*, 339 F.2d 564, 566 (9th Cir. 1964), and public airport officials, *In re Airport Car Rental Antitrust Litig.*, 693 F.2d 84, 86 (9th Cir. 1982), without clearly resolving the scope of the sham exception in those cases.

If the exact scope of the sham exception to the *Noerr-Pennington* doctrine has not always been clear in the administrative context, our cases at least stand for the general proposition that "the scope of immunity depends on the degree of political discretion exercised by the

government agency." *Forro Precision*, 673 F.2d at 1060 n.10. *See also Boone*, 841 F.2d at 896 ("If the agency and the council were acting as adjudicative bodies, the range of lobbying activities immunized by *Noerr-Pennington* would be much narrower.") Recent cases by the Supreme Court and this circuit (*e.g., Professional Real Estate, Amarel, USS-POSCO,* and *Liberty Lake*) have clarified the scope of the sham exception in judicial proceedings, but they do not alter this court's previous understanding that for purposes of the sham exception, executive entities are treated like judicial entities only to the extent that their actions are guided by enforceable standards subject to review. Only when administrative officials must follow rules is it meaningful to ask whether a petition before an agency was "objectively baseless," or whether there has been a pattern of petitioning without regard to the "merit" of the petitions. Similarly, our concern about intentional misrepresentation to government officials is much greater outside of the political realm.

IV. Kottle's Case

With this framework in mind, we now apply the sham exception to Kottle's case. The anticompetitive behavior that Kottle alleges consists of NWK's lobbying the Department against issuing a CON for KCKC's kidney dialysis center. Allegedly, NWK made numerous intentional misrepresentations to the Department and it engaged in improper and unlawful lobbying efforts.

If we thought that the Department was an essentially political entity, like the San Francisco Board of Permit Appeals, *see Franchise Realty*, 542 F.2d at 1079, Kottle's

suit would have absolutely no merit at all. Misrepresentations are a fact of life in politics, *California Motor Transp.*, 404 U.S. at 512, and lobbying is the sine qua non of democracy. *Id.* at 510-11.

We conclude, however, that the Department exercises a sufficiently circumscribed form of administrative authority that it is appropriate to apply the same sham exception here that we do in the litigation context. Heeding our own observation that executive entities come in many shapes and sizes, we will not list any single factor, or combination of factors, as decisive in determining whether the Department operates in a sufficiently non-political way to warrant application of the judicial sham exception. Rather, we look to the totality of the circumstances.

The CON determination by the Department bears many indicia of a true adjudicatory proceeding. The Department conducts public hearings, accepts written and oral arguments, permits representation by counsel, and allows affected persons to question witnesses. The Department must issue written findings after its hearing. Its decision is appealable, and that appeal is governed by APA procedures and statutory standards. In all, we believe that this combination of facts makes the application of the judicial sham exception appropriate in this case.

Thus, Kottle can get around the *Noerr-Pennington* doctrine only if his allegations show one of three things: (1) NWK's advocacy before the Department was objectively baseless and merely an attempt to stifle competition; (2) NWK engaged in a pattern of petitions before the

Department without regard to the merit of the petitions; or (3) NWK's misrepresentations before the Department deprived the entire CON proceeding of its legitimacy. We can easily dispense with the second of these grounds because Kottle's complaint alleges interference with only two CON applications. *See Amarel*, 102 F.3d at 1519 (holding that a handful of legal proceedings does not amount to a "pattern" of baseless claims).

We can also dispense with the first of these grounds. NWK's advocacy before the Department was not objectively baseless because NWK prevailed. In the litigation context, the Supreme Court has reminded us that a winning lawsuit is, by definition, not objectively baseless. *Professional Real Estate*, 508 U.S. at 61 n.5. Because we view the CON hearing as analogous to litigation, we must conclude that a victory before the Department necessarily indicates that NWK's position was not objectively baseless. *See Franchise Realty*, 542 F.2d at 1079 ("We find it particularly hard to accept the characterization as 'baseless' or 'frivolous' of opposition which is entirely successful in obtaining the governmental action sought, as apparently was the case here.") We note that Kottle did have the right to appeal the Department's decision, and had he obtained a reversal of the Department's denial of the CON, then NWK's initial victory before the Department would not necessarily indicate that NWK's position was not objectively baseless. *Hydranautics v. Filmtec Corp.*, 70 F.3d 533, 538 (9th Cir. 1995). A winning lawsuit that is overturned on appeal, after all, is not a winning lawsuit, and the same logic applies to an administrative ruling. As far as the record discloses, however, Kottle did not appeal the Department's ruling. Therefore, the success of NWK's

opposition to Kottle's CON applications conclusively demonstrates that the opposition was not objectively baseless.

This leaves Kottle with only the third of the sham exception possibilities. Notwithstanding *Noerr-Pennington*, Kottle can overcome a 12(b)(6) motion if his allegations demonstrate that NWK so misrepresented the truth to the Department that the entire CON proceeding was deprived of its legitimacy. Kottle's complaint, however, falls far short of adequately alleging this variant of the sham exception. He alleges in very general terms that NWK engaged in a hostile campaign to oppose the CON applications; that it used "means which were improper and/or unlawful"; that it conspired with other unnamed entities to oppose Kottle's CON applications; that it made misrepresentations about Kottle and the need for a kidney dialysis center, and encouraged others to do so; and that these statements influenced the Department's decision.

From Kottle's complaint, we do not know exactly what representations NWK made, or to whom; with whom NWK conspired; what exactly its "improper and/or unlawful" methods of advocacy were; or what other testimony the Department may have had that could have influenced its decision to deny Kottle's CON application. Normally, we would be willing to give Kottle the benefit of the doubt, because in reviewing a dismissal for failure to state a claim, we usually ask ourselves whether the plaintiff could prove *any* set of facts that would entitle

him to relief.[6] *Franchise Realty*, 542 F.2d at 1082. This case is different, however, because when "a plaintiff seeks damages . . . for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." *Id.* at 1083.

In such cases, we employ a heightened pleading standard, and that standard "would have no force if in order to satisfy it, a party could simply recast disputed issues from the underlying litigation as 'misrepresentations' by the other party." *Mohla*, 944 F.2d at 536 (citing *Omni Resource Dev. Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1414 (9th Cir. 1984)).

We conclude, that Kottle's vague allegations of misrepresentation "are therefore insufficient to overcome *Noerr-Pennington* protection." *Id.*[7]

AFFIRMED.

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[6] It also appears that Kottle has taken his "best shot." The record does not disclose that he requested leave to amend his complaint.

[7] In addition to his challenge to NWK's *Noerr-Pennington* immunity, Kottle contends that the district court erred in not striking an affidavit attached to NWK's reply memorandum in support of its motion to dismiss. The affidavit's sole purpose was to put before the court certain public records of the Department. We agree with the district court that these records were properly the subject of judicial notice; therefore, reliance on them did not convert the motion to dismiss into a summary judgment motion. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994).

APPENDIX B

United States District Court

WESTERN DISTRICT OF WASHINGTON

SHELDON P. KOTTLE,

v.

NORTHWEST KIDNEY CENTERS,

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C96-472D

[ ] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's motion to dismiss is GRANTED and this action is DISMISSED.

(Filed Oct. 4, 1996)

October 4, 1996
Date

Bruce Rifkin
Clerk

/s/ Elva McGregor
(By) Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SHELDON P. KOTTLE Plaintiff, v. NORTHWEST KIDNEY CENTER Defendant.	No. C96-0472D ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

After careful consideration, plaintiff's motion for Reconsideration is DENIED. The Court wishes to clarify an apparent misunderstanding by plaintiff of the Court's earlier order by making it clear that plaintiff's status as a for-profit entity was not a pivotal element of the Court's decision. Had the plaintiff been a non-profit corporation, the Court's decision would have been identical.

The Clerk of the Court is directed to send copies of this order to all counsel of record.

DATED this 30th day of October, 1996.

/s/ Carolyn R. Dimmick
Carolyn R. Dimmick
Chief Judge

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHELDON P. KOTTLE, Plaintiff-Appellant, v. NORTHWEST KIDNEY CENTERS, Defendant-Appellee.	No. 96-36258 DC No. CV 96-0472 CRD **ORDER** (Filed Aug. 19, 1998)

Before: THOMPSON and TASHIMA, Circuit Judges, and STAGG, District Judge.*

Appellant's motion to allow replacement of petition for rehearing which, in substance, is a motion to permit the late filing of an untimely petition for rehearing, is granted and the petition for rehearing received by the Clerk on Jul. 23, 1998, together with the motion, is ordered filed.

The petition for rehearing is denied.

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* The Honorable Tom Stagg, Senior United States District Judge for the Western District of Louisiana, sitting by designation.

APPENDIX E

15 U.S.C. § 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, ch 647, § 1, 26 Stat. 209; Aug. 17, 1937, ch 690, Title VIII, § 1, 50 Stat. 693; July 7, 1955, ch 281, 69 Stat. 282; Dec. 21, 1974, P.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, P.L. 94-145, § 2, 89 Stat. 801; Nov. 16, 1990, P.L. 101-588, § 4(a), 104 Stat. 2880.)

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15 U.S.C. § 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000 or by imprisonment not exceeding three years,

or by both said punishments, in the discretion of the court.

(July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282; Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Nov. 16, 1990, Pub.L. 101-588, § 4(b), 104 Stat. 2880.)

RCW 70.38.115.

(1) Certificates of need shall be issued, denied, suspended, or revoked by the designee of the secretary in accord with the provisions of this chapter and rules of the department which establish review procedures and criteria for the certificate of need program.

(2) Criteria for the review of certificate of need applications, except as provided in subsection (3) of this section for health maintenance organizations, shall include but not be limited to consideration of the following:

(a) Until June 30, 1990, the relationship of the health services being reviewed to the applicable health plans;

(b) The need that the population served or to be served by such services has for such services;

(c) The availability of less costly or more effective alternative methods of providing such services;

(d) The financial feasibility and the probable impact of the proposal on the cost of and charges for providing health services in the community to be served;

(e) In the case of health services to be provided, (i) the availability of alternative uses of project resources for the provision of other health services, (ii) the extent to which such proposed services will be accessible to all residents of the area to be served, and (iii) the need for and the availability in the community of services and facilities for osteopathic and allopathic physicians and their patients. The department shall consider the application in terms of its impact on existing and proposed institutional training programs for doctors of osteopathy and medicine at the student, internship, and residency training levels;

(f) In the case of a construction project, the costs and methods of the proposed construction, including the cost and methods of energy provision, and the probable impact of the construction project reviewed (i) on the cost of providing health services by the person proposing such construction project and (ii) on the cost and charges to the public of providing health services by other persons;

(g) The special needs and circumstances of osteopathic hospitals, nonallopathic services and children's hospitals;

(h) Improvements or innovations in the financing and delivery of health services which foster cost containment and serve to promote quality assurance and cost-effectiveness;

(i) In the case of health services proposed to be provided, the efficiency and appropriateness of the use of existing services and facilities similar to those proposed;

(j) In the case of existing services or facilities, the quality of care provided by such services or facilities in the past; and

(k) In the case of hospital certificate of need applications, whether the hospital meets or exceeds the regional average level of charity care, as determined by the secretary.

Enacted by Laws 1979, Ex. Sess., ch. 161, § 11, eff. Jan. 1, 1980. Amended by Laws 1980, ch. 139, § 8, eff. Jan. 1, 1981; Laws 1983, ch. 235, § 8; Laws 1984, ch. 288, § 22; Laws 1989, ch. 175, § 126, eff. July 1, 1989; Laws 1989, 1st Ex. Sess., ch. 9, § 605, eff. July 1, 1989.

WAC 246-310-190 Ex parte contacts. (1) There shall be no ex parte contacts as defined in WAC 246-310-010(17) after whichever of the following occurs last:

(a) The conclusion of a public hearing held in accordance with WAC 246-310-180, or

(b) The final action of the appropriate regional health council, or

(c) The final action of the hospital commission.

* * *

WAC 246-310-200 Bases for findings and action on applications. (1) The findings of the department's review

of certificate of need applications and the action of the secretary's designee on such applications shall, with the exceptions provided for in WAC 246-310-470 and 246-310-480 be based on determinations as to:

(a) Whether the proposed project is needed;

(b) Whether the proposed project will foster containment of the costs of health care;

(c) Whether the proposed project is financially feasible; and

(d) Whether the proposed project will meet the criteria for structure and process of care identified in WAC 246-310-230.

* * *

WAC 246-310-210 Determination of need. The determination of need for any project shall be based on the following criteria, except these criteria will not justify exceeding the limitation on increases of nursing home beds provided in WAC 246-310-810.

(1) The population served or to be served has need for the project and other services and facilities of the type proposed are not or will not be sufficiently available or accessible to meet that need. The assessment of the conformance of a project with this criterion shall include, but need not be limited to, consideration of the following:

* * *

(b) In the case of health services or facilities proposed to be provided, the efficiency and appropriateness of the use of existing services and facilities similar to those proposed.

* * *

WAC 246-310-500 Issuance, suspension, denial, revocation, and transfer of a certificate of need.

* * *

(3) The department shall apply the following provisions when suspending a certificate of need.

(a) The secretary's designee may suspend a certificate of need for cause which shall include, but not be limited to:

(i) Suspicion of fraud,

(ii) Misrepresentation,

(iii) False statements,

(iv) Misleading statements,

(v) Evasion or suppression of material fact in the application for a certificate of need or any of its supporting materials.

* * *

(6) The department shall apply the following provisions in the revocation of a certificate of need.

(a) The secretary's designee may revoke a certificate of need for cause which shall include the following:

(i) Fraud,

(ii) Misrepresentation,

(iii) False statements,

(iv) Misleading statements, and

(v) Evasion or suppression of material facts in the application of a certificate of need, or in any of its supporting materials.

* * *

Supreme Court, U.S.
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No. 98-810

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SHELDON P. KOTTLE,

Petitioner,

vs.

NORTHWEST KIDNEY CENTERS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the district court and the Ninth Circuit correctly conclude that the vague allegations of misrepresentation in Petitioner's Complaint are insufficient to overcome *Noerr-Pennington* protection for Northwest Kidney Centers' petitioning of the government?

2. As an alternative basis for upholding the district court's decision dismissing the Complaint, are Petitioner's claims barred by the applicable statutes of limitation since he pled no overt acts by Respondent within the four years immediately preceding the filing of the Complaint?

PARTIES TO THE PROCEEDING

Petitioner is Sheldon P. Kottle, M.D. Respondent is Northwest Kidney Centers, a non-profit corporation organized under the laws of the State of Washington.

RULE 29.6 STATEMENT

Northwest Kidney Centers has no parent company or subsidiaries.

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APPENDIX

Appendix A — Relevant Statutes And Regulations .. 1a

Respondent Northwest Kidney Centers respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Ninth Circuit's opinion in this case.

OPINIONS BELOW

This case was filed in the United States District Court for the Western District of Washington. On October 4, 1996, The Honorable Carolyn R. Dimmick granted Northwest Kidney Centers' motion to dismiss on the basis of *Noerr-Pennington* immunity (unpublished opinion; *see* CR 33). Kottle appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed the district court ruling on June 18, 1998 (opinion published at 146 F.3d 1956 (9th Cir. 1998) and reprinted in Appendix A to the Petition for Writ of Certiorari).

STATUTES AND REGULATIONS INVOLVED

This case involves the Sherman Act, 15 U.S.C. §§ 1, 2 (set forth in Appendix E to the Petition for Writ of Certiorari), the Washington Consumer Protection Act, Revised Code of Washington ("RCW") 19.86.030 *et seq.*, and the State Health Planning and Resources Development Act, RCW 70.38.015 *et seq.* and accompanying regulations, Washington Administrative Code ("WAC") 246-310-010 *et. seq.* Excerpts of the Washington statutes and regulations cited by Respondent are contained in the Appendix to this brief.

STATEMENT OF THE CASE

I. The Nature of the Case.

Under the *Noerr-Pennington* doctrine, a party exercising its First Amendment right to petition the government does not violate the antitrust laws. Two courts below have reviewed the facts of this case and applied the *Noerr-Pennington* doctrine to determine

that Petitioner's Complaint did not state a claim for antitrust violations, because Respondent's conduct was protected petitioning activity.

Petitioner alleges that in 1991, an entity called King County Kidney Centers ("KCKC") filed certificate of need applications with the Washington State Department of Health ("Department") seeking authority to build two kidney dialysis centers. CR 1, at ¶ 3.3.[1] Under Washington law, dialysis centers cannot be built without permission from the Department, which must determine that there is a need for such a facility.

As an "affected person" under the statutory scheme establishing the certificate of need program, Northwest Kidney Centers participated in the Department's public hearings on KCKC's applications. At the hearing, Northwest Kidney Centers, along with other "affected persons," including King County Medical Blue Shield and the Health Care Purchasers Association, submitted information in opposition to KCKC's applications. CR 21. Ultimately, in March 1992, the Department determined not to grant the requested certificates of need to KCKC. *Id.* KCKC did not appeal administratively, as it could have done.

Four years later, Petitioner Sheldon P. Kottle, a physician who alleges he was associated with KCKC, *see* CR 1, at ¶ 3.3, filed this antitrust action claiming that Northwest Kidney Centers' petitioning activities before the Department violated state and federal antitrust laws.

II. The Proceedings Below.

Plaintiff's Complaint was filed on March 27, 1996, and served on Northwest Kidney Centers on May 24, 1996. On July 18,

1. References to "CR" and "SER" are references to the Clerk's Record and the Supplemental Excerpts of Record submitted with the briefing to the Ninth Circuit.

Northwest Kidney Centers moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) on three grounds. First, the activities complained of were protected under the First Amendment right to petition the government, commonly referred to as *Noerr-Pennington* immunity. Second, Kottle's claims were barred by the four-year statute of limitations applicable to antitrust claims. Third, Kottle lacked antitrust standing to bring the action. CR 10; CR 11.

Kottle filed a memorandum in opposition to the motion to dismiss. On September 6, 1996, while the motion to dismiss was pending, Kottle moved to amend his complaint to add KCKC as a plaintiff. CR 24. Significantly, Kottle did *not* seek to amend his Complaint to add any further factual allegations in an effort to overcome the factual deficiencies identified by Northwest Kidney Centers' motion to dismiss.

At the time that Northwest Kidney Centers filed its motion to dismiss in July 1996, it also filed a motion to stay discovery pending the outcome of the motion to dismiss. (Kottle had served written discovery requests in June 1996.) SER Docket, entries 7 & 8. Kottle did not oppose Northwest Kidney Centers' motion to stay discovery. Accordingly, on August 2, 1996, the district court entered an order staying discovery until further notice. SER Docket, entry 14.

On October 4, 1996, the district court dismissed the Complaint and entered judgment for Northwest Kidney Centers. CR 33; CR 34. The Honorable Carolyn R. Dimmick found "plaintiff has not alleged with specificity, the type and degree of misrepresentations that would constitute a corruption of the core proceedings" so as to deprive Northwest Kidney Centers of *Noerr-Pennington* immunity. CR 33 at 10. The district court thus found it unnecessary to reach the second and third grounds offered in support of defendant's motion to dismiss. *Id.*

Kottle appealed to the Ninth Circuit, which affirmed the district court ruling in an opinion filed on June 18, 1998. The Ninth Circuit found that the allegations in Kottle's Complaint fall "far short of adequately alleging" that the certificate of need proceeding "was deprived of its legitimacy," as required to invoke the sham exception to *Noerr-Pennington* immunity. Pet. at A16. Kottle then filed a motion for reconsideration which was denied. He now seeks review by this Court of the Ninth Circuit's decision.

III. Factual Background.

A. *The Statutory Scheme for the Certificate of Need Program.*

The provision of kidney dialysis services in Washington is not left to market forces. Instead, it is highly regulated by the State of Washington through a certificate of need program, codified in the State Health Planning and Resources Development Act ("Health Planning Act"). No person or entity may build a new facility to provide dialysis services, or expand an existing facility, without approval from the State. RCW 70.38.105(3), (4)(a), (h).[2]

After receipt of a certificate of need (or "CON") application, the Department may conduct a public hearing. At such a hearing, any person may appear and, directly or through counsel, present oral and written arguments and evidence. An "affected person" also may appear and "conduct reasonable questioning of persons who make relevant factual allegations." WAC 246-310-180(5). Any health care facility that provides services similar to those sought to be provided by the applicant is considered an "affected person." WAC 246-310-010(2)(b).

The Health Planning Act sets forth specific criteria that the Department must consider in evaluating an application for a CON.

---

2. Excerpts of the pertinent Washington statutes and regulations that were in effect at the relevant time are included in the Appendix to this brief.

These criteria include the need for the health services proposed, the availability of less costly or more effective alternatives, the financial feasibility of the proposal, and the probable impact on health care costs. RCW 70.38.115(2). In addition, the regulations governing the CON process for kidney disease treatment centers include a specific formula to be applied in calculating need. WAC 246-310-280.

Following a hearing, the Department must issue written findings. WAC 246-310-490. An applicant who has been denied a CON has the right to an adjudicative proceeding governed by the Washington Administrative Procedure Act. WAC 246-310-610.

B. *The CON Applications Filed by King County Kidney Center.*

Kottle alleges that in 1991, he "took formal steps to create a new kidney dialysis facility under the name King County Kidney Center (KCKC), with two locations in Seattle and Kirkland." CR 1, at ¶ 3.3. KCKC filed applications for two certificates of need with the Department of Health the same year. *Id.* Pursuant to its authority, the Department held hearings on the applications. Northwest Kidney Centers, as an "affected person," appeared before the Department and opposed KCKC's applications. Other entities, such as King County Medical Blue Shield and the Health Care Purchasers Association, submitted testimony opposing the KCKC applications as well. CR 21, at Ex. C, p. 10.

Ultimately, in two letters dated March 30, 1992, the Department denied KCKC's applications. CR 1, at ¶ 3.6; CR 21. Though KCKC could have appealed the Department's decision administratively, WAC 246-310-610, and ultimately to the courts, it did not do so.

C. *The Claims Made in the Complaint.*

The Complaint filed in this case alleges an unreasonable restraint of trade and attempted monopolization under Sections 1 and 2 of the Sherman Act and the analogous provisions of State law. CR 1, at ¶¶ 4.1, 4.2.

The facts provided in the Complaint as the basis for these antitrust claims are conclusory and lack specificity. Kottle complains that Northwest Kidney Centers "aggressively opposed Plaintiff's CON applications . . . with the intent of eliminating competition." CR 1, at ¶ 3.4. The Complaint alleges that when Northwest Kidney Centers opposed the applications, it made "false statements of fact and misrepresentations about KCKC" and about "the need for kidney dialysis services in the areas proposed to be served by KCKC and [Northwest Kidney Centers'] ability to meet the needs of King County residents with its then current capacity." CR 1, at ¶ 3.6. No specifics are provided, however, and none of the alleged false statements is described in the Complaint. The gravamen of the Complaint is simply that Northwest Kidney Centers opposed KCKC's applications and the CONs were denied. This offends Kottle, but it does not make out an antitrust violation, as two courts below now have found. Accordingly, Kottle's petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT.

The petition for a writ of certiorari should be denied for several reasons. First, both the district court and the Ninth Circuit reviewed Kottle's factual allegations and determined that they were not sufficient to deprive Respondent of *Noerr-Pennington* immunity for its petitioning activities. As a result, Kottle's antitrust claims were properly dismissed pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted.

Second, there is no true and direct conflict in the circuits on the scope of the "sham exception" to *Noerr-Pennington* immunity. The facts in the case to which Kottle points to establish the alleged conflict, *St. Joseph's Hospital, Inc. v. Hospital Corporation of America*, 795 F.2d 948 (11th Cir. 1986), are opaque at best, and the decision cannot fairly be said to be in conflict with the decision of the Ninth Circuit here. Moreover, *St. Joseph's* and the other cases on which Kottle relies were decided before this Court's decisions in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), and *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991), which give shape to the sham exception.

Third, when Kottle moved to amend the Complaint to add KCKC as a plaintiff he passed up the opportunity to amend to add facts that might overcome the deficiencies identified by Northwest Kidney Centers in its then-pending motion to dismiss. As the Ninth Circuit found, his failure to seek leave to amend suggests Kottle had taken his "best shot." Pet. at A17, n.6. In addition, the lower courts properly took judicial notice of public records from the Department of Health certificate of need process. Thus, the courts had the opportunity to evaluate the Complaint with more information than was provided in the Complaint itself.

Finally, this case does not merit review because it could have been dismissed on the basis that the statute of limitations had run. Though the lower courts did not reach this issue, it provides an alternative basis for denying the petition because Respondent moved to dismiss on this basis as well as on the strength of *Noerr-Pennington* immunity.

II. *NOERR-PENNINGTON* IMMUNITY PROTECTS PETITIONING ACTIVITIES BEFORE THE GOVERNMENT.

This Court has repeatedly held that petitioning activities such as those alleged in the Complaint here are protected and cannot give rise to antitrust liability. The Court first addressed this issue in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). In *Noerr*, certain railroads engaged in an aggressive lobbying campaign to persuade the legislatures of several states to adopt legislation limiting competition from truckers. The Court held that such efforts to influence the legislative process are protected under the First Amendment to the Constitution, and thus are immune from antitrust liability. 365 U.S. at 137-38, 143-44.

The Court reached this result despite acknowledging that "the railroads' sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-distance freight business." *Id.* at 138. This anticompetitive motive, however, was irrelevant:

> The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. *It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.* . . . Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act.

Id. at 139 (emphasis added).

Four years later in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the Court extended the *Noerr* exception to attempts to influence governmental officials in the executive branch. Again, the Court held that "efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. at 670.

Ultimately, *Noerr-Pennington* immunity was extended to protect petitioning in proceedings before state and federal administrative agencies and courts. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). This protection applies to petitioning in opposition to a certificate of need before an administrative agency. *See Potters Medical Center v. City Hospital Association*, 800 F.2d 568, 578-79 (6th Cir. 1986); *Tarabishi v. McAlester Regional Hospital*, 951 F.2d 1558, 1570 (10th Cir. 1991), *cert. denied*, 505 U.S. 1206 (1992).

III. THE NINTH CIRCUIT CORRECTLY FOUND THAT KOTTLE'S VAGUE ALLEGATIONS OF MISREPRESENTATION ARE INSUFFICIENT TO OVERCOME *NOERR–PENNINGTON* PROTECTION.

A. Petitioner Cannot Meet the Heightened Pleading Standard Required to Strip Respondent of *Noerr-Pennington* Immunity.

On a motion to dismiss, a court must accept all material allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *See Scheuer v. Rhodes*, 416 U.S. 232 (1974). Petitioner, however, argues that some "special status" is accorded to antitrust complaints under which motions to dismiss are especially disfavored. Pet. at 14. In making this argument, Kottle has the matter exactly backwards. His Complaint seeks to attach antitrust liability to Northwest Kidney Centers for petitioning the government. A heightened pleading standard applies

to such a complaint. The Ninth Circuit has appropriately recognized that when the sufficiency of a complaint seeking damages for "conduct which is prima facie protected by the First Amendment" is at issue, "the danger that the mere pendency of the action will chill the exercise of First Amendment rights *requires more specific allegations than would otherwise be required.*" *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076, 1083 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977) (emphasis added). In such a case,

> we require[ ] that the plaintiffs satisfy more than the usual 12(b)(6) standard, . . . "*a complaint must include allegations of the specific activities*" which bring the defendant's conduct into one of the exceptions to *Noerr-Pennington* protection. . . . *This heightened level of protection* accorded petitioning activity is necessary to avoid "a chilling effect on the exercise of this fundamental First Amendment right."

Oregon Natural Resources Council v. Mohla, 944 F.2d 531, 533 (9th Cir. 1991) (quoting *Franchise Realty*, 542 F.2d at 1082) (emphasis added)); *compare* Fed. R. Civ. P. 9(b).

Simply alleging, as Kottle does in his Complaint, that Northwest Kidney Centers made "false statements of fact and misrepresentations," CR 1, at ¶ 3.6, is not enough to defeat a motion to dismiss under this standard:

> [T]he heightened pleading standard of *Franchise Realty* would have no force if in order to satisfy it, a party could simply recast disputed issues from the underlying litigation as "misrepresentations" by the other party. *See Omni Resource Development Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1414 (9th Cir. 1984)

> ("[N]othing more is alleged than the use of false affidavits in the state suit. That, however, is a charge that can easily be leveled, and is thus insufficient by itself to overcome *Noerr-Pennington* immunity.").

Oregon Natural Resources Council, 944 F.2d at 536; *see Boone v. Redevelopment Agency*, 841 F.2d 886, 894 (9th Cir.), *cert. denied*, 488 U.S. 965 (1988) ("[c]onclusory allegations are insufficient to strip [defendants] of *Noerr-Pennington* protection").

In judging the sufficiency of Kottle's Complaint in this case, the district court and the Ninth Circuit properly applied this heightened pleading standard by which a complaint must be examined when a party seeks to convert petitioning the government into the basis for an antitrust case. CR 33, at pp. 4-5; Pet. at A16-A17. Because Kottle did not meet this standard, this Court should not accept review of Kottle's claims.

B. Northwest Kidney Centers' Activities in Opposing KCKC's Certificate of Need Applications Were Protected by the First Amendment Right to Petition.

In his Complaint, Kottle charges that Northwest Kidney Centers "aggressively opposed Plaintiff's CON applications," and that defendant "acted with the intent of eliminating competition and preserving its monopoly in the kidney dialysis market in King County." CR 1, at ¶ 3.4. Petitioner charges that Northwest Kidney Centers' participation before the Department of Health was "intended to, and did, influence the Department to reject Plaintiff's application for a dialysis facility in King County." CR 1, at ¶ 3.6. Even if these allegations are accepted as true, as they must be on a motion to dismiss, they are legally insufficient to establish antitrust liability. The Sherman Act simply does not reach activities

by which "the people . . . freely inform the government of their wishes." *Noerr*, 365 U.S. at 137. Consequently, the petitioning activity of Northwest Kidney Centers before the Department of Health was prima facie protected activity that cannot form the basis for antitrust liability.

1. *Northwest Kidney Centers' Petitioning Activities Do Not Fall Within the Sham Exception to Noerr-Pennington Immunity.*

Kottle argues that he sufficiently pled facts within the sham exception to *Noerr-Pennington* so as to preclude dismissal of his Complaint. Pet. at 19-20. Kottle's discussion of the sham exception, however, is inconsistent with this Court's ruling in *Professional Real Estate* and those *Noerr-Pennington* cases decided since.

2. *The Sham Exception Is Narrow.*

The sham exception was first enunciated in *Noerr* and has since been refined by this Court on several occasions, most recently in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), and *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993).

Omni involved the efforts of a billboard advertising company to influence the enactment of a zoning ordinance that made it very difficult for the company's rivals to erect billboards of their own. In the ensuing antitrust action, plaintiff claimed that defendant engaged in sham petitioning before the city council. Plaintiff argued that the case involved governmental "corruption," and alleged the existence of a "secret anticompetitive agreement" between its rival and city officials under which city council members "received advantages." 499 U.S. at 367, 376.

The Court found for defendant, however, and rejected the claim of sham petitioning. "The 'sham' exception to Noerr

encompasses situations in which persons use the governmental *process* — as opposed to the *outcome* of that process — as an anticompetitive weapon." 499 U.S. at 380 (emphasis in original). The Court explained:

> A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. See California Motor Transport. . . . A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 496, 500, n.4, . . . not one "who 'genuinely seeks to achieve his government result, but does so *through improper means*,' " *id.* at 508, n.10 . . . (quoting Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 827 F.2d 458, 465, n.5 (CA9 1987)).

499 U.S. at 380 (emphasis in original).

Thus, urging governmental action that will injure a rival does not amount to a sham if the injury will flow from the governmental action sought. This is true even when "improper means" are used in the petitioning. It is only when the petitioner seeks to harm its rival through abuse of the petitioning process that the petitioning may be a sham.

Most recently, in *Professional Real Estate*, 508 U.S. 49 (1993), the Court again affirmed that sham petitioning cannot occur when the petitioning at issue is invoked in a genuine attempt to influence governmental action. The Court went further and held that "an objectively reasonable effort to litigate cannot be a sham regardless of subjective intent." *Id.* at 60. The Court thus established a two-

part test for whether the sham exception applies in the context of litigation:

> First, [to be a sham] the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail.

508 U.S. at 60. In other words, to be "objectively baseless," "sham litigation must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief." *Id.* at 62. As long as the litigant has "probable cause to institute legal proceedings," which is defined as a reasonable belief that there is a chance of success, the lawsuit cannot be a sham. *Id.* at 62-63 (citations omitted). Accordingly, a "winning lawsuit is by definition a reasonable effort at petitioning for redress and not a sham." *Id.* at 60 n.5. *See also FilmTec Corp. v. Hydranautics*, 67 F.3d 931, 936 (Fed. Cir. 1995) ("Obviously, if the patentee is successful in his infringement action, his suit is not baseless, and it cannot be a sham.").

The Court in *Professional Real Estate* then explained the second prong of the sham exception:

> Only if the challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere *directly* with the business relationships of a competitor," *Noerr* . . . , through the "use [of]

> the governmental *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon," *Omni* . . . .

508 U.S. at 60-61 (citation omitted) (emphasis in original).

In a footnote, the Court left open the question of whether misrepresentations can ever constitute a sham sufficient to take petitioning activity outside *Noerr* protection. 508 U.S. at 61 n.6. This issue was addressed by the Ninth Circuit in *Liberty Lake Investments, Inc. v. Magnuson*, 12 F.3d 155 (9th Cir. 1993), *cert. denied*, 513 U.S. 818 (1994), an important case on which the courts below relied (CR 33, at p. 9; Pet. at A9-A13), but which Kottle ignores completely. In that case, when Liberty Lake Investments sought to develop property, its plans were challenged (unsuccessfully) before governmental agencies and in the courts. Liberty Lake then filed an antitrust suit against its opponents, who in turn claimed *Noerr-Pennington* immunity. Liberty Lake argued that its opponents had engaged in unethical conduct amounting to "fraud and misrepresentation." 12 F.3d at 158. According to Liberty Lake, "abuse in the litigation process" would render petitioning conduct a sham without regard to *Professional Real Estate*'s two-part test. *Id.*

The Ninth Circuit noted that in footnote 6 of *Professional Real Estate*, this Court had reserved the question of whether fraud or other misrepresentations may amount to a "sham." *See Liberty Lake*, 12 F.3d at 158. The court held, however, that the Supreme Court's reservation of that question did not "obviate application of the Court's two-part test for determining sham litigation in the absence of proof that a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy." *Id.* at 159. The Court explained:

> As we read the Court's footnote 6, however, it does no more than reserve the issue of whether antitrust liability may be premised on a litigant's deceptive

> conduct which goes to the *core of a lawsuit's legitimacy*, such that it is not "genuine," either in the sense of "'having the reputed or apparent qualities or character'" (i.e., objectively "genuine") or being " 'sincerely and honestly felt or experienced' " (i.e., subjectively "genuine").

Id. at 158 (quoting *Professional Real Estate*, 508 U.S. at 61) (emphasis added); *see Amarel v. Connell*, 102 F.3d 1494, 1518-20 (9th Cir. 1996) (plaintiff failed to show that litigation and efforts to influence State Department officials were baseless and without probable cause). The Ninth Circuit affirmed the dismissal of the Complaint here because plaintiff's claims, even when accepted as true, simply fell far short of this standard: the conduct attributed to Northwest Kidney Centers did not "deprive the litigation [here, the underlying administrative proceeding] of its legitimacy." *Liberty Lake*, 12 F.3d at 159.

3. *Kottle's Description of the Sham Exception Is Incorrect and Leads Him to the Wrong Result.*

Kottle's discussion of the proper scope of the sham exception hopelessly jumbles together different concepts in a confused and inconsistent manner that ultimately leads him to the wrong result. Kottle argues that the two-part test for sham litigation recently articulated in *Professional Real Estate* has little application in the administrative adjudicatory setting. Pet. at 6-11. But his efforts to draw some distinction, for *Noerr-Pennington* purposes, between the "litigation" and "the adjudicatory process," misses the mark and ignores footnote 6 in *Professional Real Estate.*

The distinction Kottle perceives between "litigation" and the "adjudicatory process" does not exist in the relevant *Noerr-Pennington* case law. In *California Motor Transport Co. v. Trucking Unlimited*, this Court grouped together contested

proceedings before administrative agencies and the courts as "adjudicatory" proceedings, 404 U.S. 508, 512 (1972), and discussed the sham exception as having the same scope in all such proceedings. Thus, a contested proceeding before an administrative agency is one to which the two-part test enunciated in *Professional Real Estate* applies.[3]

4. *Kottle's Complaint Does Not Allege Specific Facts of Sham Petitioning by Northwest Kidney Centers.*

Kottle asserts that he has alleged false statements and misrepresentations in his Complaint sufficient to plead a sham. Pet. at 14-17. Yet the operative language in the Complaint asserts only that Northwest Kidney Centers:

- "aggressively opposed Plaintiff's CON applications using methods and means which were improper and or unlawful;"

- "made false statements of fact and misrepresentations about plaintiff and KCKC and encouraged others to do so;" and

---

3. Since the decision in *Professional Real Estate*, several courts have applied the two-part test developed there in a non-litigation context. *See, e.g., Classic Communications, Inc. v. Rural Telephone Service Co.*, 956 F. Supp. 910 (D. Kan. 1997) (defendant's petitioning activities in connection with plaintiff's application to the city for a local telephone exchange franchise analyzed under the sham exception set forth in *Professional Real Estate*); *EnviroSource, Inc. v. Horsehead Resource Development Co.*, 1996-2 Trade Cas. (CCH) ¶ 71,492 (S.D.N.Y. 1996) (*Professional Real Estate* test for sham exception applies to defendant's activities in opposing plaintiff's delisting petition before the EPA); *Fischer Sand and Aggregate Co. v. City of Lakeville*, 874 F. Supp. 957, 959 n.3 (D. Minn. 1994) ("[t]here is no reason to believe the test enunciated [in *Professional Real Estate*] does not apply equally to conduct allegedly intended to influence executive and legislative bodies").

> • made "false statements and misrepresentations [that] included, but were not limited to, the need for kidney dialysis services in the areas proposed to be served by KCKC and NWK's ability to meet the needs of King County residents with its then current capacity."

CR 1, at ¶¶ 3.4, 3.6. In his briefing below, and again here (Pet. at 15-17), Kottle argues that the specific misstatements can be found by contrasting statements made by Northwest Kidney Centers in 1992 when it opposed KCKC's CON applications with statements Northwest Kidney Centers made in 1995. In fact, there is no contradiction in these statements, and Kottle's reliance on them fails to add any specificity to the vague claims in the Complaint, let alone plead a corruption of the adjudicatory process so pervasive that it deprived that process of its legitimacy.

For example, Kottle alleges that in 1992, Northwest Kidney Centers *predicted* that the number of kidney dialysis stations needed through 1996 would be a certain number, and that in 1995, the actual number of existing stations was greater than Northwest Kidney Centers had predicted it would be three years earlier. Predictions, of course, are inherently speculative. Moreover, need calculations are made according to a set formula established by the Department. *See* WAC 246-310-280 (set forth in full in the Appendix to this brief). The need can change from year to year as a result of changing demographics, demand for service, and new technology.

Kottle was required to plead specific "deceptive conduct which goes to the *core of a lawsuit's legitimacy*." *Liberty Lake*, 12 F.3d at 158 (emphasis added). His briefs, filed long after he purposefully refused to avail himself of an opportunity to amend the Complaint, and which dispute the accuracy of a prediction

made years before the statements made in 1995, hardly rise to this standard.

Kottle also alleges Northwest Kidney Centers "planned the identical center they opposed as 'unnecessary.' " Pet. at 16. This is essentially the same argument addressed above. The fact that Northwest Kidney Centers applied in 1995 to build kidney dialysis stations in the area where Kottle had proposed to build them three years earlier, does not suggest there was a need for those stations three years earlier, or that Northwest Kidney Centers must have "presented false data" back in 1992.

Kottle's other allegations regarding Northwest Kidney Centers' conduct in petitioning the Department (Fet. at 16-17), similarly are lacking in support and in significance to the CON process. Kottle takes out of context and misunderstands the data regarding home dialysis, fails to comprehend the difference between the "cost" of a health care facility and "charges" for healthcare services, and misstates the law on ex parte contacts with the Department. *See* WAC 246-310-190 (*See* Pet. at E4). Northwest Kidney Centers' contacts with the Department had to do with matters other than Kottle's CON applications and they occurred, by Kottle's own admission in his reply brief to the Ninth Circuit, at or before the public hearing. Such contacts do not violate the Department's regulations, which only prohibit contacts about a specific application after the "conclusion of a public hearing." *Id.*

Conspicuously lacking from Kottle's Complaint and Petition are specific allegations that allege "knowing fraud" or "intentional misrepresentations" which, if proven, would show "deceptive conduct which goes to the core of a lawsuit's legitimacy, such that it is not 'genuine,' " as described by the Ninth Circuit in *Liberty Lake*, 12 F.3d at 159, and in this case, *Kottle,* 146 F.3d 1056 (9th Cir. 1998), building on footnote 6 in *Professional Real Estate.* Kottle does not claim that he was deprived of the opportunity to

present his application, statistical information, and arguments to the Department. He does not allege facts that would show that the "core" of the administrative proceedings before the Department of Health lost their "legitimacy," or were corrupted as a result of Northwest Kidney Centers' alleged misstatements. Instead, Kottle simply complains that Northwest Kidney Centers presented a different opinion than he did to the Department on whether there was a need for the services KCKC offered to provide. These are ultimately matters of opinion and the Department has its own detailed formula for determining need. *See* WAC 246-310-280. That one party believes the other is wrong does not deprive the opponent of immunity for petitioning the government.

A complaint that fails to allege the petitioning involved knowingly false statements, and that "fails to provide *specific allegations* that would when proven establish the knowing falsity of the statements," cannot " 'strip [activities] of their *Noerr-Pennington* protection.' " *Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 957 (S.D. Cal. 1996) (quoting *Boone v. Redevelopment Agency*, 841 F.2d at 886) (emphasis added); *see Music Center v. Prestini Musical Instruments Corp.*, 874 F. Supp. 543, 549 (E.D.N.Y. 1995) ("antitrust claims based solely on broad and indistinct allegations of misrepresentation and 'sham litigation' " were not allowed to reach discovery). As the lower courts correctly found, Kottle does not provide specific facts that show how Northwest Kidney Centers' alleged misrepresentations went to the "core" of the "legitimacy" of the proceedings before the Department. Without such allegations, Kottle cannot deprive Northwest Kidney Centers of its First Amendment right to petition the government.

IV. CASES ADDRESSING THE SUFFICIENCY OF ALLEGATIONS IN THE CONTEXT OF *NOERR-PENNINGTON* IMMUNITY ARE FACT SPECIFIC AND THERE IS NO CLEAR CONFLICT IN THE CIRCUITS.

Petitioner relies primarily on *St. Joseph's Hospital, Inc. v. Hospital Corp. of America*, 795 F.2d 948 (11th Cir. 1986), to argue that this Court should accept review to resolve a split in the circuits. The claimed split in the circuits is illusory. The Eleventh Circuit's opinion in *St. Joseph's* gives scant details of the conduct that was alleged to fall within the sham exception to *Noerr-Pennington*. As a result the case provides little guidance on when allegations are sufficient to overcome *Noerr-Pennington* immunity.

In *St. Joseph's*, plaintiff (St. Joseph's) filed an application for a certificate of need to enable it to expand its cardiac care services to include cardiac surgical services. *Id.* at 952. Defendant Memorial Medical Center ("Memorial") opposed the CON application asserting that it had the capacity to perform 1500 open heart procedures per year, which far exceeded the requirements of the region. *Id.*

Prior to issuing a decision on the CON, the administrative body charged with such decisions adopted a new cardiac surgery rule. Finding that the availability and accessibility of current cardiac surgery services fulfilled the new requirements, the administrative agency denied St. Joseph's CON application. *Id.* St. Joseph's appealed the denial to a Review Board (something Kottle did not do in this case), and Memorial then requested and was granted the right to intervene. *Id.* As soon as Memorial was allowed to intervene, "it began a course of conduct designed to delay the proceedings." *Id.* From that point on, the administrative and court proceedings arising from St. Joseph's CON application became increasingly complicated. The Review Board held that St. Joseph's had shown a need for additional cardiac services, but

the new cardiac surgery rule prohibited it from issuing a CON. *Id.* at 953. The Georgia Court of Appeals disagreed and affirmed the review Board's finding that the need for additional services had been shown. *Id.* During all of these proceedings, Memorial attempted to get the case dismissed. Thus, before the final decision on the CON application, St. Joseph's filed suit against Memorial alleging violations of the Sherman Act resulting from Memorial's submission of false information to the administrative agency considering the CON application. *Id.*

In a short discussion, the Eleventh Circuit simply stated:

> In order to find that a situation falls within an exception to a general rule, it must first be clear that the general rule itself is applicable. The plaintiff here has alleged misrepresentations before a governmental agency. When a governmental agency such as SHPA is passing on specific certificate applications it is acting judicially. Misrepresentations under these circumstances do not enjoy *Noerr* immunity.

Id. at 955. This is the extent of the Eleventh Circuit's analysis regarding the alleged misrepresentations in that case. The opinion provides no detail as to what the misrepresentations were, nor how detailed the allegations of misrepresentation were in the complaint. Not every misrepresentation, no matter how minor, serves to strip *Noerr-Pennington* protection from otherwise legitimate petitioning activities, and the Eleventh Circuit's opinion provides no guidance as to how to draw this line. In the absence of these facts it is impossible to claim that *St. Joseph's* is at odds with the Ninth Circuit's opinion here.

Likewise, the decisions Kottle cites from the Fourth Circuit and District of Columbia Circuit do not conflict with the Ninth

Circuit's decision. In *Israel v. Baxter Lab., Inc.*, 466 F.2d 272 (D.C. Cir. 1972), plaintiff, a pharmaceutical company, alleged that defendants, two competitors and an FDA official, conspired to keep plaintiff's drug from being approved by the FDA. Specifically, plaintiff alleged that they

> carried out this conspiracy by suppressing, concealing and misconstruing information concerning the two drugs before the FDA; by arranging for the employment as a consultant to the FDA of a medical doctor who had a financial interest in Baxter, which was seeking approval of its own . . . drug . . . ; by applying an unfair standard in judging [the drug]; and by misrepresenting the safety and efficacy of [the drug].

Id. at 274. These allegations, unlike Kottle's, were very specific and alleged a conspiracy which, if true, would have deprived the underlying proceeding of its legitimacy and rendered it a sham.

Similarly, plaintiff in *Hospital Building Co. v. Trustees of the Rex Hospital Corp.*, 691 F.2d 678, 687 (4th Cir. 1982), *cert. denied*, 464 U.S. 890 (1983), alleged a complicated web of conspiracy involving government officials, including the chairman of the Central Planning Council and an assistant attorney general. As a result, there was evidence that the process itself had been abused in a way that prevented the plaintiff from gaining meaningful access to the administrative process. The Fourth Circuit was cautious, however, about the scope of the sham exception and expressly rejected the lower court's jury instruction that "conduct in abuse of the adjudicatory or administrative process which is part of a larger conspiracy to restrain trade or to monopolize a market is not immune from the antitrust laws." *Id.* at 687-88. This and other such broad jury instructions were

"erroneous in light of *California Motor Transport*, which extends *Noerr-Pennington* immunity to the adjudicatory setting." *Id.* at 688. The court also ruled that the alleged misrepresentations must be made with the requisite intent to abuse the administrative process before they fall within the sham exception. *Id.* This holding is consistent with the Ninth Circuit's ruling in this case and in *Liberty Lake*. Thus, *Hospital Building Co.* does not support Kottle's argument that Supreme Court review is needed to resolve a conflict in the circuits.

In short, each case alleging misrepresentations in the administrative process turns on its own facts and the decisions do not conflict with the Ninth Circuit's decision here. Moreover, these cases are over a decade old and precede this Court's decision in *Professional Real Estate*, which was the basis for the Ninth Circuit's decisions in *Liberty Lake* and this case. Accordingly, there is no true conflict in the circuits and this Court should not issue a petition for a writ of certiorari to review the Ninth Circuit's decision.

V. PETITIONER NEVER ATTEMPTED TO AMEND HIS COMPLAINT TO CORRECT THE DEFICIENCIES IN HIS ALLEGATIONS.

Kottle's Complaint implicates the *Noerr-Pennington* doctrine: he complains of Northwest Kidney Centers' conduct in petitioning the government. Northwest Kidney Centers thus moved to dismiss the Complaint on the basis of *Noerr-Pennington* immunity. Kottle, however, made no effort to amend his Complaint to flesh out the vague and conclusory allegations. Fed. R. Civ. P. 15 provides that leave to amend "shall be freely given when justice so requires." Kottle did not seek to take advantage of that rule to provide specific information regarding the alleged misrepresentations and false statements in the petitioning. Nor did he oppose Northwest Kidney Centers' motion to stay discovery. As the Ninth Circuit correctly

concluded, Kottle took his "best shot" and failed to plead sufficient facts to overcome *Noerr-Pennington* protection. Under these circumstances, the petition for a writ of certiorari should be denied.

This case also fails to merit review, because the lower courts looked carefully at not only the Complaint, but also the public records from the CON process. On a motion to dismiss, courts may take judicial notice of public records outside the pleadings. *See MGIC Indemnity Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986); *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Thus, the lower courts had ample evidence from which to judge the sufficiency of the allegations in the Complaint and their ability to overcome *Noerr-Pennington* immunity.

VI. ALTERNATIVELY, KOTTLE'S COMPLAINT CAN BE DISMISSED ON THE GROUND THAT HIS CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

This action was filed on March 27, 1996. The statute of limitations for claims under the federal antitrust laws and Washington Consumer Protection Act is four years. 15 U.S.C.A. § 15b (1997); RCW 19.86.120. The only date given in the Complaint for any of the actions is 1991. *See* CR 1, at ¶ 3.3. In the district court, Kottle claimed "the earliest date" on which his "antitrust injury arose" was March 30, 1992—the date on which the Department of Health denied KCKC's certificate of need applications. CR 17 at p. 7. But that is not a date on which Northwest Kidney Centers took any action that led to Kottle's alleged injury, and therefore it is not the date from which the statute began to run.

The statute of limitations on an antitrust claim begins to run on the date of the defendant's last overt act. *See Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987). The act

of an independent governmental body, such as the Department of Health, is not an overt act of defendant Northwest Kidney Centers. *Cf. Pace*, 813 F.2d at 239 (normal course of adjudication does not constitute overt act by defendant). Thus, the statute of limitations is not tolled with respect to a defendant's act pending the outcome of a proceeding. *See id.*; *Lender's Service, Inc. v. Dayton Bar Assoc'n*, 758 F. Supp. 429 (S.D. Ohio 1991). Kottle has failed to allege that Northwest Kidney Centers took any overt act that caused him harm after March 27, 1992. Accordingly, his claims are time-barred and the complaint could have been dismissed on this alternative ground. For this additional reason, the Court should deny the Petition for Writ of Certiorari. *See Gemtel Corp. v. Community Redevelopment Agency of the City of Los Angeles*, 23 F.3d 1542, 1546 (9th Cir. 1994) (court may affirm lower court's dismissal on any ground supported by the record).

CONCLUSION

For the foregoing reasons, Northwest Kidney Centers respectfully requests that the Court deny Kottle's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — RELEVANT STATUTES AND REGULATIONS

RCW 70.38.105. Health services and facilities requiring certificate of need — Fees

(1) The department is authorized and directed to implement the certificate of need program in this state pursuant to the provisions of this chapter.

(2) There shall be a state certificate of need program which is administered consistent with the requirements of federal law as necessary to the receipt of federal funds by the state.

(3) No person shall engage in any undertaking which is subject to certificate of need review under subsection (4) of this section without first having received from the department either a certificate of need or an exception granted in accordance with this chapter.

(4) The following shall be subject to certificate of need review under this chapter:

(a) The construction, development, or other establishment of a new health care facility;

* * *

(h) Any increase in the number of dialysis stations in a kidney disease center.

* * *

Appendix A

RCW 70.38.115. Certificates of need — Procedures — Rules — Criteria for review — Conditional certificates of need — Concurrent review — Review periods — Hearing — Adjudicative proceeding — Amended certificates of need

(1) Certificates of need shall be issued, denied, suspended, or revoked by the designee of the secretary in accord with the provisions of this chapter and rules of the department which establish review procedures and criteria for the certificate of need program.

(2) Criteria for the review of certificate of need applications, except as provided in subsection (3) of this section for health maintenance organizations, shall include but not be limited to consideration of the following:

(a) Until June 30, 1990, the relationship of the health services being reviewed to the applicable health plans;

(b) The need that the population served or to be served by such services has for such services;

(c) The availability of less costly or more effective alternative methods of providing such services;

(d) The financial feasibility and the probable impact of the proposal on the cost of and charges for providing health services in the community to be served;

* * *

Appendix A

WAC 246-310-010 Definitions.

* * *

(2) "Affected persons" means:

(a) The applicant;

(b) Health care facilities and health maintenance organizations providing services similar to the services under review and located in the health service area;

(c) Third-party payers reimbursing health care facilities in the health service area;

(d) Any agency establishing rates for health care facilities and health maintenance organizations in the health service area where the proposed project is to be located;

(e) Health care facilities and health maintenance organizations which, in the twelve months prior to receipt of the application, have submitted a letter of intent to provide similar services;

(f) Any person residing within the geographic area to be served by the applicant; and

(g) Any person regularly using health care facilities within the geographic area to be served by the applicant.

* * *

Appendix A

WAC 246-310-180 Public hearings.

(1) "Opportunity for a public hearing," as used in this section, shall mean a public hearing will be conducted if a valid request for such a hearing has been submitted by one or more affected persons.

(2) The department shall provide opportunity to affected persons for a public hearing on:

(a) A certificate of need application which is under review, unless the application is being reviewed according to the emergency or expedited review processes; . . .

* * *

(5) In a public hearing on a certificate of need application or on a proposed withdrawal of a certificate of need, any person shall have the right to be represented by counsel and to present oral or written arguments and evidence relevant to the matter which is the subject of the hearing. Any person affected by the matter may conduct reasonable questioning of persons who make relevant factual allegations.

Appendix A

WAC 246-310-280 Kidney disease treatment centers.

(1) To receive approval, a kidney disease treatment center must meet the following standards in addition to applicable review criteria in WAC 246-310-210, 246-310-220, 246-310-230, and 246-310-240.

(2) End stage renal disease planning areas shall be health service areas. The health service areas are as follows:

(a) Health service Area I includes Clallam, Jefferson, San Juan Island, Kitsap, Pierce, King, Snohomish, Skagit, and Whatcom counties.

(b) Health service Area II includes Thurston, Mason, Grays Harbor, Pacific, Wahkiakum, Lewis, Cowlitz, Clark, Skamania, and Klickitat counties.

(c) Health service Area III includes Okanogan, Chelan, Douglas, Grant, Kittitas, Yakima, Benton, and Franklin counties.

(d) Health service Area IV includes Ferry, Stevens, Pend Oreille, Lincoln, Spokane, Adams, Whitman, Walla Walla, Columbia, Garfield, and Asotin Counties.

(3) The maximum number of dialysis stations needed in an end stage renal disease planning area shall be determined using the following data:

(a) Utilization of a dialysis station or a center.

(i) One hundred percent utilization equals twelve dialyses per week.

Appendix A

(ii) Eighty percent utilization equals 9.6 dialyses per week.

(iii) When determining the utilization of an existing center each station on which at least six patients have been self/home trained annually shall be deducted from the approved stations.

(iv) When determining the utilization of an existing center, the utilization rate may be reduced to seventy-five percent and seventy percent in facilities with ten percent and twenty percent peritoneal dialysis patients respectively.

(b) At the time of the application, the most recent Washington state office of financial management population data.

(c) Historical data of the Northwest renal network.

(d) The health service area's most recent three-year average shall be used for incidence, death, transplant, and home training rates.

(4) The maximum number of dialysis stations projected as needed in an ESRD planning area shall be determined using the following methodology:

(a) Identify the number of incenter patients expected in the planning area in the year in which the application is submitted.

(i) Add expected new ESRD and re-entry cases per year.

(ii) Subtract expected ESRD patient deaths per year.

(iii) Subtract expected ESRD home training patients per year.

(iv) Subtract the number of expected functional transplants per year.

(b) Calculate the number of expected dialyses by multiplying the number of incenter patients by three treatments per week.

(c) Calculate the number of dialysis stations needed in the applicant's projected third full year of operation using eighty percent utilization.

(5) All kidney disease treatment centers within a reasonable driving time must be operating at an eighty percent utilization rate before additional stations are approved.

(6) New kidney disease treatment centers must reasonably project an eighty percent utilization rate by the third year of operation.

Appendix A

WAC 246-310-490 Written findings and actions on certificate of need applications.

(1) Written findings.

(a) The findings of the department's review of a certificate of need application shall be stated in writing and include the basis for the decision of the secretary's designee as to whether a certificate of need is to be issued or denied for the proposed project.

(b) In making its findings and taking action on a certificate of need application, the department shall use all criteria contained in chapter 246-310 WAC applicable to the proposed project.

* * *

Appendix A

WAC 246-310-610 Adjudicative proceeding.

(1) An applicant denied a certificate of need or a certificate holder whose certificate was suspended or revoked has the right to an adjudicative proceeding.

* * *

(3) The proceeding is governed by the Administrative Procedure Act (chapter 34.05 RCW), this chapter, and chapter 246-08 WAC. If a provision in this chapter conflicts with chapter 246-08 WAC, the provision in this chapter governs.

(3)

Supreme Court, U.S.
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No. 98-810

In The

Supreme Court of the United States

October Term, 1998

SHELDON P. KOTTLE, M.D.,

Petitioner,

vs.

NORTHWEST KIDNEY CENTERS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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ARGUMENT

Plaintiff's Claims Are Not Barred By the Statute of Limitations.

In its opposition to Kottle's Petition, Northwest Kidney Centers ("NWK") argues that the dismissal of Dr. Kottle's complaint should be upheld on the alternative basis that Kottle's claims were not filed within the applicable statute of limitations. (Opp. Cert. 7, 25-26). NWK has made this argument in the courts below, both of which disregarded it for good reason. This defense has little merit.

An antitrust action under federal or state law must be "commenced within four years after the cause of action accrued." 15 U.S.C. § 15b; *see also* RCW 19.86.120. An antitrust cause of action does not accrue until the defendant commits some act or acts which violate the antitrust laws *and* which injures plaintiff's business. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). A plaintiff suing under antitrust laws has no right to maintain suit until he is in fact injured. *Maricopa County v. American Pipe & Constr. Co.*, 303 F.Supp. 77 (D.C. Ariz. 1969), *aff'd*, 431 F.2d 1145 (9th Cir. 1970), *cert. denied*, 401 U.S. 937 (1971). In the absence of injury, there is no cause of action.

The Washington Department of Health denied Dr. Kottle's two certificate of need applications on March 30, 1992 based in large measure upon false and deceptive "information" provided to it by NWK. While NWK obviously provided this false and deceptive "information" to the Department well before March 30, 1992, that is the earliest date on which it could be said that Kottle suffered

any kind of injury. Prior to that date, he did not and could not provide kidney dialysis services in the state of Washington; therefore, NWK's false and deceptive "information", however wrong and misguided, had no impact on his trade or business. As this Court articulated in *Zenith*, a "cause of action for future damages . . . will accrue only on the date they are suffered." *Zenith*, 401 U.S. at 339. The injury did not occur until Kottle was denied the opportunity to engage in the kidney dialysis business – on March 30, 1992. Kottle's complaint was filed on March 27, 1996, within the four year statute of limitations set forth in federal and state law.[1]

NWK's reliance upon the Ninth Circuit decision in *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234 (9th Cir. 1987) and the District Court ruling in *Lender's Service, Inc. v. Dayton Bar Ass'n*, 758 F.Supp. 429 (S.D.Ohio 1991) is seriously misplaced. In both cases, the "last overt act causing injury" was the initiation of legal proceedings which caused a *present* injury to the plaintiff's trade or business. In *Lender's Service*, the plaintiff was presently engaged in the business of providing property reports

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[1] The Complaint was filed only *four months* after the Department of Health awarded NWK a certificate of need to construct dialysis facilities of the exact same size, scope and location NWK had earlier argued to be unnecessary. Although NWK's CON was granted in December 1995, NWK's own internal documents reflect that it was being planned years before. CR 38 Exhibit 1, pp. 7, 88; CR 31 Exhibit 1 pp. 17-20. Nor is there anything in the record whatsoever to support NWK's argument that its dramatically altered calculation of "need" in 1994 was based upon "changing demographics, demand for service, and new technology" that had occurred since 1992. (Opp. Cert. 18).

when the Dayton Bar Association filed suit claiming that plaintiff was engaged in the unauthorized practice of law. *Lender's Service, Inc.*, 758 F.Supp. at 433. The suit by the bar association had an immediate effect on plaintiff's business; therefore, the district court correctly found that the date in which the bar association filed the suit was the date in which the statute of limitations began to run.

Similarly, in *Pace Indus.*, the alleged antitrust violation was the filing of a lawsuit which sought to enforce allegedly illegal covenant not to compete. Pace Industries was presently engaged in the business of manufacturing and marketing disc testing equipment when Three Phoenix Company filed a state court injunction and accounting action. *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d at 236. The action had an *immediate* effect on Pace Industries' business, and therefore was deemed by the Ninth Circuit to be the "last overt act" causing injury. "We hold that where the alleged antitrust violation is the attempted enforcement of an illegal contract through judicial processes, the initiation of judicial proceedings is the last overt act for purposes of the statute of limitations." *Id.* at 236.

Both cases stand in stark contrast to Dr. Kottle's situation. Dr. Kottle was not in the business of providing kidney dialysis services during NWK's misinformation campaign; he needed to obtain a certificate of need from the Washington Department of Health before he could engage in such services. It was not until he was denied this opportunity that he suffered any damages from the false and deceptive information NWK provided to the Washington Department of Health.

CONCLUSION

Kottle's complaint was brought within the four year statute of limitations applicable to federal and state antitrust claims. The pleadings filed by Kottle meet the threshold of sufficiency and specificity to sustain his allegations that NWK made intentional misrepresentations and false statements to the Washington Department of Health for which it should not be shielded from liability. This is a case in which the "sham" exception to Noerr Pennington immunity should be applied. The petition for a writ of certiorari should be granted.

Respectfully submitted this 1st day of February, 1998.

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